> dence of mistake, failure to exercise honest judgment, bad faith, fraud, duress or other impeaching circumstances may be plead to set aside an award. [Citations omitted.]
>
> "Reluctance of the [petitioner's] original attorney to proceed against the [respondent] on the basis of bias, failure to exercise honest judgment, and other circumstances generally indicating reviewability of the award, lead to a disagreement between the [petitioner] and his then counsel which culminated in a filing of a motion to withdraw as counsel on August 28, 1969. On that date, the Court's order permitted the withdrawal of the attorney of record for the [petitioner] and further ordered the [petitioner] to retain new counsel and make an appearance with that counsel within 30 days." (Appellant's Brief in the Court of Appeals,[1] pp. 3-4.)

That order in addition to permitting petitioner's first counsel to withdraw, specifically stated:

> "IT IS FURTHER ORDERED that the Clerk of this Court will serve the [petitioner] with copy of this order by mail at the following address: 5142 Palomar Street, Dallas, Texas 75229, and that unless new counsel for [petitioner] files an appearance herein within thirty (30) days from this date, an order dismissing this action for want of prosecution will be entered." (Order Allowing Withdrawal of Counsel, Appendix to the Briefs in the Court of Appeals,[2] pp. 17-18.)

On or about the date of the above order, August 28, 1969, petitioner contacted the office of his second counsel and retained his services to appear in the trial court. (Apt's.

[1] Appellant's [petitioner's] brief in chief in the court of appeals will hereafter be cited as "Apt's. Br."

[2] The appendix in the court of appeals, which was printed and contains all the papers in the trial court except the briefs, will hereafter be referred to as "A."

Br. 4.) A copy of the trial court's order was received in the second counsel's offices on or about September 3, 1969. (Apt's. Br. 4.) Said new counsel was in communication with petitioner concerning this case on September 24, 1969. (Memorandum Brief on Plaintiff's Plea for Reinstatement and/or Relief from Judgment or Order, p. 3, that brief is attached as Appendix B.)

Upon failure to comply with the trial court's order requiring the appearance of the new counsel, the action was dismissed on October 1, 1969 by judgment of the trial court (Appendix A of Pet.) On that very day, October 1, 1969, petitioner in his memorandum brief admits receiving a copy of the judgment dismissing the case for want of prosecution. (Appendix B to this Brief.)

However, petitioner did not file a motion for new trial until October 15, 1969 (A. 19), which motion was out of term under Rule 59(b), Federal Rules of Civil Procedure. No notice of appeal from the judgment was filed because petitioner wanted "to prevent action in two courts, simultaneously, on the same point" (Apt's. Br. 37); although petitioner did not mind filing a second suit in the trial court on November 10, 1969 against respondent for the same hail damages. (The dismissal by a different judge of that second action is presently on appeal by petitioner to the United States Court of Appeals for the Fifth Circuit in cause number 71-1894.)

The first reference to relief from the judgment under Rule 60, Federal Rules of Civil Procedure, did not come

until petitioner's amended motion was filed on December 22, 1969 (A. 20). It is the order denying that relief (Appendix A to this Brief) that gives rise to the current petition for certiorari.

ARGUMENT

Thus, notwithstanding that petitioner voluntarily participated in an appraisal of his loss but contended that he should not be bound by the appraisal since it was only 10% of what he expected, notwithstanding the express mandate of the trial court's order of August 28, 1969 requiring the appearance of new counsel within 30 days, which order was well-known to plaintiff and his second counsel, notwithstanding that petitioner knew of the judgment dismissing his case within time both to file a timely motion for new trial and to take an appeal, and notwithstanding his deliberate election to proceed by filing a second independent action on the same controversy, he now seeks to use the denial of his later motion for relief under Rule 60(b), F.R.C.P., as the basis for invoking this Court's discretion and asserting that this is an important and special case.

I.

This case is uniquely controlled by its own peculiar facts.

Actually, it is difficult to conceive of a case more narrow in scope than the one at bar. How often would any court find a suiter that first defaulted on the merits before suit

(no appraisal under the policy), then "agreed" to comply after pre-trial (the appraisal), but rejected that result (since it was only 10% of what he wanted), thus fired his first counsel, failed to comply with a specific order of the court (to have new counsel enter an appearance), failed to move for new trial, elected not to appeal, elected to file an independent second suit, and then complains because he did not get a full dress hearing on his later Rule 60(b) motion (unsupported by any affidavit or other evidence) even though his second suit was then pending in the same court? We submit that a more defaulting petitioner would be hard to find and that a case more controlled by its own facts cannot be found.

Therefore by no stretch of the imagination can this case, either by amount in controversy or by the law applicable to the facts, be considered a special and important case.

II.

The decision below is clearly correct.

A. *Relief from a final judgment may not be used as a substitute for an appeal.*

This Court has established the principle that where a party has chosen not to appeal from a judgment, he cannot be later relieved therefrom under Rule 60(b)(1) & (6). *Ackermann v. United States*, 340 U.S. 193 (1950). It is uncontroverted that petitioner had the time both to move for a new trial in the trial court and to appeal, but he made the free, calculated and deliberate choice not to appeal, for as he

stated: "no appeal was taken from the initial judgment to prevent action in two courts, simultaneously, on the same point" (Apt's. Br. 37).

Such reasoning makes no sense at all. Relief from a judgment under Rule 60(b) should not even be considered until after an appeal has been denied or the time for perfecting such has expired. Rule 60(b) relief is not available as a substitute for the appeal that one deliberately chooses not to take. *Farmers Co-Op v. Strand*, 382 F. 2d 224 (8th Cir. 1967); cert. denied 389 U.S. 1014 (1967). *Strand* is particularly applicable to the case at bar because it too involved a plaintiff's filing of a second separate lawsuit which was also dismissed.

B. *Under the facts of the case petitioner received the hearing to which he was entitled.*

We have attached to this brief (as Appendix C) a copy of the notice from the clerk concerning the case at bar. It will be noted that said notice provides that no motion will be filed without an accompanying brief, and that:

> "Every motion is considered submitted within ten (10) days of service of such motion and accompanying brief. No oral argument will be permitted except upon the Court's initiative."

This notice, of course, was addressed to petitioner's first counsel; however, upon his discharge the second counsel acquired petitioner's file. (Apt's. Br. 30.)

Pursuant to the local rule or order of the trial court, motions are determined upon the moving papers and oral argu-

ment is not allowed unless the court directs. Such a local rule is contemplated by Rule 78, F.R.C.P., appears to be found throughout the nation, and thus is well-established procedure. *Morrow v. Topping*, 437 F. 2d 1155 (9th Cir. 1971); *United States Fidelity & Guaranty Co. v. Lawrenson*, 334 F. 2d 464 (4th Cir. 1964), cert. denied 379 U.S. 869 (1964). Such being the case, it naturally follows that any assertions in a motion not supported by the record itself should be supported by affidavit or other appropriate proof submitted with the motion. Therefore, the granting of any hearing in this case was within the discretion of the trial court, and there was no impediment to the trial court carefully considering the motion as he did (A. 22) on the moving papers.

C. Relief from a final judgment is to be granted only under exceptional circumstances which petitioner failed to show.

It is well-established that Rule 60(b) provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances. *Hulson v. Atchison T. & S.F. Ry.*, 289 F. 2d 726 (7th Cir. 1961), cert. denied 368 U.S. 835 (1961); *Farmers Co-Op v. Strand*, 382 F. 2d 224 (8th Cir. 1967), cert. denied 289 U.S. 1014 (1967). As we have stated above, such a motion cannot be used as a substitute for an appeal, *Ackermann v. United States*, 340 U.S. 193 (1950); *Farmers Co-Op v. Strand*, 382 F. 2d 224 (8th Cir. 1967), cert. denied 289 U.S. 1014 (1967), and likewise such motion cannot be used as a means of enlarging, by indirection, the time for taking an appeal. *Swam v. United States*, 327 F. 2d 431 (7th Cir. 1964), cert. denied 379 U.S. 852 (1964).

Therefore, the petitioner having elected to file a second suit and not to appeal received the hearing to which he was entitled; the motion for relief from the judgment was properly denied, and the affirmance by the intermediate court was correct. Petitioner complains that too much leeway is left to the individual court in passing upon such a motion; however, since petitioner admits that relief under Rule 60(b) is addressed to the sound discretion of the trial court, it follows as a matter of course that the exercise of such discretion must depend upon the individual facts in each individual case. Therefore, we submit it would be inappropriate and undesirable for this Court to now set forth in this case specific retroactive guidelines for the application of Rule 60(b) as suggested by the petitioner.

III.

There is no constitutional right to a specific type of hearing or to an opportunity to present oral argument thereat.

The petitioner attempts to make a constitutional issue out of the trial court's denying him what he calls a "hearing." The error in this position is that he received the hearing to which he was entitled by the United States Constitution. That is, the petitioner was free to submit any affidavits or other evidence to the trial court but he chose not to, and he was free to submit any argument that he desired in support of his motion which he in fact did in the form of a memorandum brief (Appendix B to this Brief.) This brief, it seems to us, fairly well advocated the petitioner's position before the trial court.

According to the rules of the trial court, the motion was deemed submitted ten (10) days after it was filed. The moving papers failed to reveal any necessity for or a specific request for some further hearing as petitioner now asserts he was entitled to. Those papers gave the trial judge everything needed for him to decide that his discretion was not with the petitioner. It is difficult to appreciate how a further hearing could have improved petitioner's position so as to negate his deliberate choice not to move for a new trial or appeal.

As was expressly held by this Court in *F.C.C. v. Station WJR*, 337 U.S. 265 (1949), the due process clause of the Fifth Amendment to the Federal Constitution does not require an oral argument as a matter of procedural due process. The Fifth Amendment guarantees no particular form of procedure; it protects only substantive rights. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Such an oral hearing on motions in the district court is not required. *Sarelas v. Porikos*, 320 F. 2d 827 (7th Cir. 1963), cert. denied 375 U.S. 985 (1964).

That is, a fair hearing is all that is required by the Constitution, and that hearing can, of course, be solely upon written evidence and briefs. This is precisely what Rule 78, F.R.C.P. provides.

Petitioner cites *U.S. Fidelity & Guaranty Co. v. Lawrenson*, 34 F.R.D. 121 (1964) (in his Petition at p. 9) as an example of a district court opinion holding that not all motions are entitled to an oral hearing, as if the district court

opinion in that case was the only court that considered the matter. Actually, that case came all the way to this Court. See *United States Fidelity & Guaranty Co. v. Lawrenson*, 334 F. 2d 464 (4th Cir. 1964), cert. denied 379 U.S. 869 (1964). We have cited the above reported court of appeal opinion earlier in this brief for the proposition that leaving a hearing to the discretion of the district court is wise. That opinion in *Lawrenson*, upheld just such a local rule as exists in the instant case, established pursuant to Rule 78, F.R.C.P.

In conclusion, we thus submit that the petitioner's purported constitutional question is nonexistent and without merit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

September 30, 1971.

Respectfully submitted,

LARRY L. GOLLAHER,
Counsel for Respondent.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DISTRICT

Civil Action No. CA 3-2882-A

HARRY K. WASOFF,

Plaintiff,

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR REINSTATEMENT AND IN THE ALTERNATIVE MOTION FOR RELIEF FROM JUDGMENT OR ORDER

The Court, having considered with care Plaintiff's Motion for Reinstatement and in the alternative Motion for Relief From Judgment or Order, finds and determines that this motion should be and the same hereby is DENIED.

SIGNED and ORDERED ENTERED the 17th day of September, 1970.

/s/ JOE E. ESTES

United States District Judge

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DISTRICT

Civil Action No. CA 3-2882-A

HARRY K. WASOFF,

Plaintiff,

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY,

Defendant.

MEMORANDUM BRIEF ON PLAINTIFF'S PLEA FOR REINSTATEMENT AND/OR RELIEF FROM JUDGMENT OR ORDER

Plaintiff in this cause has filed a Motion for Reinstatement and/or Relief from an Order dismissing this cause with prejudice for two reasons, viz:

1. Following the withdrawal of the original attorney retained by Plaintiff, HARRY K. WASOFF, on August 14, 1969, Plaintiff made careful and honest efforts to retain another attorney, but in so doing, has caused some delays to the attorneys ultimately retained; and

2. That Mr. Robert A. Fanning, present attorney for Plaintiff was out of town when notified that he had been retained by Mr. WASOFF, and was unable to file a Notice of Appearance within the time specified so as to prevent Dismissal for want of Prosecution which occurred on October 1, 1969.

DISCUSSION

Plaintiff's Motion for Reinstatement and/or a New Trial centers upon Subsection (B) of Rule 60, 28 U.S.C.A. Rule

60(B) provides that "* * * upon Motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise or excusable neglect; * * * (6) Any other reason justifying relief from the operation of the judgment. The Motion shall be made during a reasonable time, and for reasons (1), * * * not more than one year from the judgment, order or proceedings is entered or taken * * *"

* * * * *

Note: argument on law and citations omitted

* * * * *

Reviewing the facts in the present instance, on the 28th day of August, 1969, an Order allowing withdrawal of counsel then retained by Plaintiff was entered by the Court, the same Order stated that unless new counsel for Plaintiff filed an appearance within thirty (30) days from that date that the action would be dismissed for want of prosecution. Mr. Robert A. Fanning, the attorney ultimately retained by Mr. Wasoff in this action was not in Dallas on the date the Order was entered nor when the Order was actually mailed to Plaintiff several days later. Mr. Fanning was not in communication with Plaintiff concerning his case until September 24, 1969. On October 1, 1969, the Plaintiff HARRY K. WASOFF, received a Judgment dismissing his case for want of prosecution.

Under the circumstances, there was no reasonable time in which Mr. Fanning could have filed an appearance within the specified thirty (30) days, in part for simple lack of knowledge of the facts that he should have done so. Except for this one matter of inadvertance in the filing of an appearance, your Plaintiff HARRY K. WASOFF has done everything necessary to fully and completely prosecute his case. Plaintiff has not been responsible for any unreasonable or unnecessary delay in bringing this matter to trial.

CONCLUSION

The dismissal of Plaintiff's original cause of action was due solely to inadvertence and oversight. Any neglect in the prosecution of the cause of action was clearly within the excusable category, as "excusable neglect" as defined by the cases dealing with the matter. There has been no prejudice, either in fact or by implication to the Defendant in this matter as a result of the very few days' delay in the Plaintiff's present attorney's appearance into the case. Consequently the onerous burden of dismissal with prejudice laid upon Plaintiff on October 1, 1969, should be lifted and Plaintiff should be allowed to continue in his original cause of action and the Order of Dismissal with prejudice should be vacated.

Respectfully submitted,

FANNING & HARPER

By: /s/ ROBERT A. FANNING

Robert A. Fanning

4040 First National Bank Bldg.
Dallas, Texas 75202 741-6461

APPENDIX C

12-6-68

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

To: L. W. Anderson
Franklin H. Perry

Re: Civil Action No. 3-2882-A

HARRY K. WASOFF v. AMERICAN AUTO. INS. CO.

NOTICE

The following are instructions for the handling of all cases assigned to Judge Joe E. Estes, Chief Judge:

Pre-trial conferences will be held in all cases, and the attorneys who will try the case will attend all such conferences. Pre-trial orders, approved by counsel for each of the parties, will be prepared by plaintiff's attorney and presented to Judge Estes for his approval. Suggested forms for the order may be obtained from the Clerk's office.

No motion will be filed unless it is accompanied by a brief memorandum of authorities in support thereof.

Every motion is considered submitted within 10 days of service of such motion and accompanying brief. No oral argument will be permitted except upon the Court's initiative. All motions not disposed of before the pre-trial conference will be heard and argued at that time.

In those cases presently pending in which motions have been filed, the moving attorney will submit a memorandum of authorities in support thereof at least 10 days prior to any pre-trial conference of the case.

In making jury requests, strict compliance with Rule 38(b).; Federal Rules of Civil Procedure, will be required.

Except as provided in Rule 15(a), no amendment of pleadings will be filed without leave of Court or written consent of the adverse party.

Settings will be made by Judge Estes on his own motion. A list of settings will be mailed to the interested attorneys approximately 30 days prior to the pre-trial conference.

Bailey F. Rankin, *Clerk*